

The record consists of the transcript of proceedings dated August 18, 1993; deposition of Robert A. Rawcliffe, Jr., M.D. dated May 18, 1992; deposition of Tom Lock dated May 18, 1992; deposition of James Molski dated September 20, 1993; the exhibits entered into evidence by each party and the pleadings and correspondence contained in the administrative file.

ISSUES

Respondent has filed an application for review and modification pursuant to K.S.A. 44-528. The Administrative Law Judge, after consideration of the evidence presented, found that claimant's previous award should be reduced. Respondent appeals, contending the evidence supports a further reduction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By Award dated September 21, 1990, claimant was awarded benefits based on sixty-three percent (63%) general disability. The Director reduced the Award, finding 31.5% general disability. On appeal the District Court found fifty-four percent (54%) disability. On the present application for modification and review filed pursuant to K.S.A. 44-528, Administrative Law Judge Richardson reduced the Award to forty-one percent (41%). For the reasons expressed below, the Appeals Board agrees with the modification to forty-one percent (41%).

In support of its application for review and modification the respondent presented video tape and photographs of claimant engaged in activities which suggest that claimant's physical impairment is not now as great as determined at the time of the initial award. Those films and photographs were shown to Dr. Rawcliffe, one of the physicians who had rated claimant at the time of the initial award. On the basis of those films and additional physical examination, Dr. Rawcliffe reduced his rating from fifteen percent (15%) to a five percent (5%) permanent partial disability. He also changed claimant's restrictions. At the time of the initial award Dr. Rawcliffe had recommended restrictions of twenty pound lifting and ten pound frequent lifting. He now indicates claimant should be able to lift fifty pounds on an occasional basis and frequently up to twenty-five pounds. The new restrictions were provided to James Molski, a vocational expert. He testified from those restrictions he believed that claimant's loss of access to the open labor market to be twenty percent (20%). He also indicated that the wage loss would remain sixty-three percent (63%) based upon what claimant is now earning.

From the testimony of Dr. Rawcliffe, the testimony of James Molski and the video tape and photographs, the Appeals Board agrees with the assessment by the administrative law judge that claimant's permanent partial disability has changed and should be reduced to forty-one percent (41%). This is based upon an average of between the twenty percent (20%) loss of access to the open labor market and sixty-three percent (63%) loss of ability to earn a comparable wage as authorized by Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990).

Respondent argues that the award should also be reduced still further. Respondent agrees with the new finding of loss of access to the open labor market but argues that the wage loss factor should be less. His argument is based upon the contention that claimant could have obtained employment as a locksmith. As a locksmith, according to respondent, claimant could earn more than he is now in fact earning. The Appeals Board does not consider this prong of respondent's argument to present anything new which would justify review and modification. The facts described in support of lowering the percentage of loss of ability to earn a comparable wage existed and were presented at the time the initial award was entered.

For the above reasons the Appeals Board concludes that the decision of the administrative law judge should be affirmed in all aspects.

AWARD

WHEREFORE, the award of compensation previously entered herein is hereby modified, and the Claimant is awarded a 41% permanent partial general disability for the accidental injury occurring on November 18, 1988. The modification is effective as of August 18, 1993.

The claimant is entitled to 167.29 weeks permanent partial disability compensation at the rate of \$145.99 per week, or \$24,422.67, for a 41% permanent partial general disability making a total award of \$24,422.67. As of 3/2/94 there would be due and owing to the claimant 28 weeks of permanent partial disability compensation at \$145.99 per week in the sum of \$4,087.72 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$20,334.95 shall be paid at \$145.99 per week for 139.29 weeks or until further order of the Director.

Fee and expenses of administration of the Kansas Workers Compensation Act are assessed against the Respondent and Insurance Carrier to be paid direct as follows:

Phyllis Wehking Deposition of Dr. Rawcliffe	\$148.40
Court Reporting Services Deposition of Mr. James Molski	\$157.80
Barber & Associates Deposition of Tom Lock	\$156.20
Tri-State Reporting Transcript of proceedings	\$158.75

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Grover Bryan, Attorney for Claimant, PO Box 1828, 20 W. Fifth Street, Liberal, KS
67901
Stephen J. Jones, Attorney for Respondent, 1999 North Amidon, Suite 340,
Wichita, KS 67203
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director